

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>RITCHIE H. CONNER</b>	)	
	)	
<b>Petitioner,</b>	)	<b>Civil Action No.:    7:03cv00834</b>
	)	
<b>v.</b>	)	
	)	
<b>UNITED STATES OF AMERICA</b>	)	
	)	
	)	
<b>Respondent.</b>	)	
<b>RITCHIE H. CONNER</b>	)	
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<b>Petitioner,</b>	)	<b>Civil Action No.:    7:03cv00835</b>
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<b>v.</b>	)	
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<b>UNITED STATES OF AMERICA</b>	)	
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<b>Respondent.</b>	)	
<b>RITCHIE H. CONNER</b>	)	
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<b>Petitioner,</b>	)	<b>Civil Action No.:    7:04cv00037</b>
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>UNITED STATES OF AMERICA</b>	)	<b>By: Samuel G. Wilson</b>
	)	<b>United States District Judge</b>
	)	
<b>Respondent.</b>	)	

        This is a consolidated civil action by petitioner, Ritchie H. Conner, under 26 U.S.C. § 7609(h) to quash three separate Internal Revenue Service (IRS) summonses served on Conner's third-party record-keepers in furtherance of an investigation into petitioner's tax liability for years 1996-2002. The

government filed an IRS agent's affidavit, which made a prima facie showing that (1) it is conducting an investigation for a legitimate purpose; (2) the material sought is relevant to that purpose; (3) the information sought is not already in the IRS's possession; and (4) the IRS complied with all the administrative steps required by the Internal Revenue Code. Connor countered with the affidavits of the third-party record-keepers, and those affidavits called into question the IRS's good faith, whether the records sought are already in the IRS's possession, and whether the IRS circumvented the administrative steps required by the Internal Revenue Code by prematurely examining the records before Conner had the opportunity to exercise his statutory right to challenge the summonses. The court conducted an evidentiary hearing and finds that the IRS proceeded in good faith and that Conner has failed to prove that the IRS currently possess the documents sought. Accordingly, the court enforces the summonses.

## **I.**

Witnesses produced conflicting affidavits. In an affidavit, IRS Special Agent Ross Pierson claimed to have explained to the third-party record-keepers, Lloyd H. Hartman and Rudolph Valentino Nagy, that Conner had a right to petition to quash the summonses and that they need not respond to the summonses until their respective return dates. In affidavits, Hartman and Nagy disputed Pierson's claim. They contend that Pierson demanded immediate production of the documents, that he did not mention Conner's right to petition to quash, and that they discussed the contents of the records with Pierson, who allegedly took notes.

At the evidentiary hearing, the court sought to resolve the following factual disputes bearing on the question of whether the IRS has proceeded in good faith:

- 1) Whether Pierson informed Hartman and Nagy that they had until the summonses' respective return dates to produce the records or whether Pierson demanded production of the documents on the day of service;
- 2) Whether Pierson informed Hartman and Nagy of Conner's right to petition to quash;
- 3) Whether Pierson, in effect, prematurely examined the records through his interrogation of Hartman and Nagy; and
- 4) Whether the IRS already possessed some or all of the documents sought from Nagy.

At the hearing, Pierson testified that he never demanded immediate production of the documents and that he gave each a written explanation of Conner's rights and that each had an opportunity to read it. He admitted, however, that he did not discuss Conner's rights with them. Pierson further testified that he did not discuss the content of the collected records with Hartman and Nagy and that any notes he took during the interviews did not pertain to the content of the records.

Former Revenue Agent Thomas Walker, who was present at the time of service, corroborated Pierson's account. Walker also testified that the IRS was not in possession of the records at the time of service. Hartman also testified, and his testimony was consistent with Pierson's in all material respects. Hartman admitted that Pierson gave him a written explanation of Conner's rights and that he had an opportunity to, but did not, read it. Further, Hartman testified that he produced the documents on the date of service in order to avoid having to appear at the IRS office on the return date.

Finally, the office manager of Conner's business testified that the IRS had obtained documents from Nagy earlier; however, she did not provide information sufficient to allow the court to conclude reliably that the IRS already possessed the records summonsed from Nagy.

Based on all the evidence before it, the court makes the following findings of fact:

- 1) Pierson did not demand production of the documents on the day of service;
- 2) Each summons conspicuously noted its return date;
- 3) Hartman produced the documents on the day of service in order to avoid having to appear at the IRS office on the summons return date;
- 4) Pierson did not verbally inform Hartman and Nagy of Conner's right to petition to quash; however, he gave them each a written explanation of Conner's rights, and each had an opportunity to read it before producing the records;
- 5) Pierson questioned Hartman and Nagy about their relationship with Conner; however, he did not by that questioning, in effect, prematurely examine the records;
- 6) Upon learning of Conner's petitions to quash, Pierson sealed the records in envelopes, and they have remained sealed to this date;
- 7) As of this date, neither Pierson nor any other IRS agent has examined the sealed records;
- 8) Conner has failed to demonstrate that the IRS already possessed the records at the time Pierson served the summonses.

## **II.**

The court ordered an evidentiary hearing in this matter primarily because § 7609(d) prohibits the IRS from examining records acquired from a third-party record-keeper before the close of the twenty-third day following the service of notice on the interested party, and Hartman's and Nagy's

affidavits indicated that Pierson circumvented this prohibition.<sup>1</sup> Finding that Pierson did not demand production of the records before their respective return dates, that he provided Hartman and Nagy a written explanation of Conner's rights, that he has never examined the records, and that Pierson has not otherwise effectively examined the records prematurely, Conner has not persuaded the court that the IRS has proceeded in bad faith or has violated section 7609(d).<sup>2</sup> Accordingly, the court denies Conner's petition to quash the summonses based on 7609(d).

### III.

The court also ordered an evidentiary hearing because of the allegation that the IRS already had the documents requested from Nagy. The court finds, however, that Conner failed to prove that allegation.

The government must show that the IRS currently lacks the records sought as part of its prima facie case.<sup>3</sup> See 26 U.S.C. § 7605(b); Alphin v. United States, 809 F.2d 236, 238 (4th Cir. 1987). Because the IRS had already produced an affidavit from Pierson disavowing possession of the

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<sup>1</sup>Should the party named in the summons file a petition to quash, the IRS may not examine the records until after the court renders a decision. 26 U.S.C. § 7609(d). When assessing a violation of §7609 (d), the court must evaluate the seriousness of the alleged statutory violation, weighing such factors as the IRS's good faith and any prejudice from the alleged premature examination. United States v. Bank of Moulton, 614 F.2d 1063, 1064-66 (5th Cir. 1980) (per curiam).

<sup>2</sup>Conner complains that Pierson did not comply with IRS rules because he failed to inventory the documents collected and provide a receipt to the record keepers. However, the court finds Pierson's refusal to inventory the documents to be consistent with his good faith: he did not inventory the documents because he would have had to review them to do so.

<sup>3</sup>Further, "[the] already possessed prong . . . is in fact a gloss on § 7605(b)'s prohibition of unnecessary summonses, rather than an absolute prohibition against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS." United States v. Davis, 636 F.2d 1028, 1037 (5th Cir. 1981) (internal quotes omitted).

documents, the burden to prove possession rested with Conner at the evidentiary hearing. Alphin, 809 F.2d at 238. The nondescript testimony of Conner's office manager was not sufficient to discharge Conner's burden of showing that the IRS possessed the records.. Therefore, the court denies Conner's motion to quash based on § 7605(b).

### **III.**

For the reasons stated, the court will enforce the IRS summonses.

**ENTER:** This 17th day of December, 2004.

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UNITED STATES DISTRICT JUDGE

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<b>Petitioner,</b>	)	<b>Civil Action No.: 7:04cv00037</b>
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<b>v.</b>	)	<b><u>ENFORCEMENT ORDER</u></b>
	)	
<b>UNITED STATES OF AMERICA</b>	)	<b>By: Samuel G. Wilson</b>
	)	<b>United States District Judge</b>

**Respondent.**

)  
)

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the above captioned petitions to quash are hereby **DISMISSED**. The IRS summonses served upon Hartman and Nagy are **ENFORCED**. This matter is stricken from the active docket of the court.

**ENTER:** This 17th day of December, 2004.

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UNITED STATES DISTRICT JUDGE